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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 413

TADASHI MIYAKI,

Petitioner,

vs.

ROBERT H. ROBINSON, District Director, Chicago District, United States Department of Justice, Immigration & Naturalization Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TADASHI MIYAKI, *Pro Se,*
c/o Thomas Masuda
134 North La Salle Street,
Chicago 2, Illinois.

Of Counsel:
THOMAS MASUDA.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

TADASHI MIYAKI,

Petitioner,

vs.

ROBERT H. ROBINSON, District Director, Chicago District, United States Department of Justice, Immigration & Naturalization Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Tadashi Miyaki, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals, for the Seventh Circuit, in the above case entered on July 8, 1958.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The decision and order of the Special Inquiry Officer (R. 17-20) and the decision of the Board of Immigration

Appeals (R. 11-13) are unreported. The opinion of the District Court (R. 73-84) is not reported. The opinion of the Court of Appeals (Appendix A, p. 1a) has not yet been reported. The petitioner's petition for rehearing (Appendix B, p. 2b) has not as yet been reported.

JURISDICTION.

This judgment of the Court of Appeals was entered on July 8, 1958, and petition for rehearing was denied on September 4, 1958. This petition is filed within ninety days after the opinion was rendered by the United States Court of Appeals, for the Seventh Circuit. The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

I. Whether an alien is considered "convicted" of a crime involving moral turpitude under Section 212(a)(9) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a)(9)) upon a record of having been found guilty in the State of Illinois of burning an automobile belonging to another in violation of Chapter 38, Section 50, Illinois Revised Statutes, pursuant to which no sentence was imposed, but defendant was granted probation and subsequently discharged.

II. Whether the crime of burning personal property belonging to another (Chapter 38, Ill. Rev. Stat., Sec. 50) in the State of Illinois is a crime "involving moral turpitude" under Section 212(a)(9) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a)(9)).

STATUTES.

The following statutes are involved:

I. Section 101(f)(3) of the Immigration and Nationality Act of 1952; 8 U.S.C., 1101 (f)(3)

> "(f) For the purposes of this chapter—
>
> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . .
>
> • • •
>
> (3) A member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of Section 1182(a) of this title; or paragraphs (9), (10) and (23) of Section 1182(a) of this title, if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period . . ."

II. Section 212(a)(9) of the Immigration and Nationality Act of 1952; 8 U.S.C. 1182(a)(9):

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> • • •
>
> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; except that aliens who have committed only one such crime while under the age of eighteen years may be granted a visa and admited if the crime was committed more than five years prior to the date of the application for a visa or other documentation, and more than five years prior to date of application for admission to the United States, unless the crime

resulted in confinement in a prison or correctional institution, in which case such alien must have been released from such confinement more than five years prior to the date of the application for a visa or other documentation, and for admission, to the United States;

III. Suspension of deportation:

Section 244(a)(4) of the Immigration and Nationality Act of 1952; 8 U.S.C., Sec. 1254(a)(4), Appendix D.

IV. Crime of burning personal property of another:

Chapter 38, Ill. Rev. Stat., Sec. 50, Appendix C.

STATEMENT OF THE CASE.

The petitioner is an alien born in Vancouver, British Columbia, Canada, and last legally entered the United States in January 1936 as a visitor. He having overstayed his right to remain in the United States, deportation proceedings were instituted against him by the respondent. The petitioner timely filed his application for suspension of deportation under the provisions of Section 244(a)(4) of the Immigration and Nationality Act of 1952.

Without having considered the facts and merits of petitioner's application for suspension of deportation, the Special Inquiry Officer found that the petitioner, having been "convicted of a crime involving moral turpitude", was a matter of law precluded from establishing good moral character and was therefore legally ineligible for discretionary relief from deportation.

The petitioner filed an appeal before the Board of Immigration Appeals and on September 16, 1957 the appeal was denied. The petitioner thereupon filed his complaint under the provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C., Sec. 1009, F.C.A. 1009, in the United States District Court for the Northern District of Illinois, Eastern Division, to obtain a judicial review of the respondent's conclusion that the petitioner was statutorily ineligible for consideration of suspension of deportation for the reason that he had been "convicted of a crime involving moral turpitude."

The respondent filed his answer and both the petitioner and the respondent separately filed motions for summary

judgment under Rule 56 of the Federal Rules of Civil Procedure. The District Court Judge, Julius J. Hoffman, on November 26, 1957, denied the petitioner's motion and granted the respondent's motion and dismissed the complaint.

An appeal of this ruling was taken to the United States Court of Appeals for the Seventh Circuit, which court on July 8, 1958 affirmed the order of the District Court.

The record upon which the respondent found the petitioner statutorily ineligible for consideration of suspension of deportation was based on the following facts:

On November 17, 1954, in Chicago, Illinois, the petitioner, on a plea of not guilty, after a trial by the court, was found guilty of the crime of burning an automobile belonging to another, in violation of Chapter 38, Section 50, of the Illinois Revised Statutes. The petitioner filed his petition for probation, and the Judge granted a probation for two years, conditioned upon petitioner's making full restitution of the value of the property burned. No sentence of any kind was entered in this case. After two years, all of the conditions of the probation having been fully complied with, the petitioner was discharged by the court.

ARGUMENTS.

I. We believe that the case of *Pino* v. *Landon* (1955) 344 U.S. 901, decided by this Court, is in point and that the decisions reached in the case at bar by the lower courts are in direct conflict therewith. Following the ruling of this Honorable Court in the case of *Pino* v. *Landon (supra)*, the petitioner's conviction did not attain such finality as to support an order of deportation and hence the petitioner is statutorily eligible for consideration upon his petition for suspension of deportation. The decisions of the lower courts should therefore be reversed and the case be remanded to the respondent to consider the *facts* presented in the case at bar and to exercise his discretion as to whether suspension of deportation should be granted.

In *Pino* v. *Landon (supra)*, Pino was found guilty of stealing twelve golf balls and *a sentence of one year was imposed* and probation granted. Thereafter, the probation having been completed, the sentence was suspended and the case was placed "on file". This Honorable Court held that this was not such a "conviction" of a crime involving moral turpitude as to support an order of deportation, stating as follows:

> ". . . on the record here, we are unable to say that the conviction attained such finality as to support an order of deportation within the contemplation of Section 241 of the Immigration and Nationality Act. The judgment is reversed."

We believe that this case is controlling and that the respondent, the Board of Immigration Appeals, the District Court and the Court of Appeals for the Seventh

Circuit erred in their decisions in failing to follow the mandate of the ruling of this Court in *Pino* v. *Landon (supra)*. We submit therefore that the case at bar should be reversed and remanded to the respondent to further consider the petitioner's application for suspension of deportation.

II. In the States of California and Texas the Board of Immigration Appeals, and in the State of Massachusetts this Honorable Court, ruled that a finding of guilty of a crime with subsequent probation could not be considered such a "conviction" as to support an order of deportation. We have been unable to find any case which holds that upon a finding of guilty of a crime with subsequent probation is such a "conviction" as to support an order of deportation, except the ruling made in the case at bar. Therefore the respondent and the lower courts are in error in holding that in the State of Illinois a finding of guilty of a crime with subsequent probation is such a "conviction" as to support an order of deportation. This is not a uniform application of the federal statute. *Dickoff* v. *Shaughnessy* (1956, 142 Fed. Sup. 535; *In re Mayall's Naturalization* (1957) 154 Fed. Sup. 536; 82 C.J.S. Sec. 154, p. 258; 50 Am. Jur. sec. 55, p. 75.

The Board of Immigration Appeals has ruled that in California an alien found guilty of a theft, and subsequently placed on probation, the court having suspended proceedings without imposition of sentence, was not "convicted" of a crime sufficient to sustain an order of deportation. *In re B-R*, Int. Dec. 840.

In the case involving a Texas statute, the alien knowingly attempted to pass a forged check, was found guilty and sentenced to two years of confinement in the State Penitentiary, with the sentence being suspended during

good behavior. The Board of Immigration Appeals held that the alien was deportable because of the record of "conviction". However, the Attorney General on review overruled this decision and, on the strength of *Pino* v. *Landon (supra)*, ruled that there was no such a "conviction" as could support an order of deportation. *In re L-R*, Int. Dec. 846.

The case of *Pino* v. *Landon (supra)* involved a Massachusetts statute. The defendant was found guilty and granted probation, and, after probation, the case was placed "on file". This Honorable Court held that there was not such a conviction as to support an order of deportation. *Pino* v. *Landon (supra)*.

If the crime for which the petitioner was found guilty and the granting of probation had occurred in either of the States of California, Texas or Massachusetts, the petitioner would be statutorily eligible for consideration on his application for suspension of deportation on the strength of the three cases above cited. However, in the case at bar, the respondent, the Board of Immigration Appeals, the District Court and the United States Court of Appeals for the Seventh Circuit, found the petitioner statutorily ineligible for consideration on his application for suspension of deportation. This, we contend, is diametrically opposed to the interpretation of the law as rendered in the States of California, Texas and Massachusetts, and therefore is not a uniform application of the federal law.

How can it be said that this is a uniform application of the federal law when in one state an alien can be found eligible for consideration on his petition for suspension of deportation and yet under the same state of facts he could be found ineligible for consideration on his

petition for suspension of deportation in another state? The legislative intent to have the Immigration and Nationality Act of 1952 apply uniformly as much as possible can be noted in Senate Report No. 1135, 82nd Congress, 2d Session, page 6, where Senator McCarran reported:

> "Section 101 (f) while not defining the term 'good moral character', provides standards as an aid for determining whether a person is one of good moral character within the meaning of these provisions of the bill which requires that good moral character be established for certain periods in connection with a person's eligibility for certain benefits. By providing who shall not be regarded as a person of good moral character, it is believed that a *greater degree of uniformity* will be obtained in the application of 'good moral character' tests under the provisions of the bill." (emphasis added)

We submit that probation in any state, having as one of its ultimate purposes the rehabilitation of the individual, should be considered with the same legal force and effect everywhere for the purpose of determining the moral fitness of an alien. We cannot see how slight differences in probation laws should result in finding a person of good moral character in one state and not of good moral character in another state, as applied to the deportation statutes. This we contend is not a uniform application of the federal law.

III. The petitioner not having received any sentence on the finding of guilty of the crime of burning personal property in the State of Illinois, his conviction has not attained such finality as to support an order of deportation without considering the merits of his petition for suspension of deportation.

The word "convicted" as used in the phrase "convicted of a crime involving moral turpitude" should be clearly defined by this Court so as to avoid the contrariety of opinions that has taken place in this matter. This Court has stated that doubts in construction of statutes be resolved in favor of the alien because deportation is a drastic measure. *Fong Haw Tan* v. *Phelan* (1948) 333 U.S. 6; *In the Pet. of Catalanotte* (1956) 236 F. 2d 955. Also it was held in *Barber* v. *Gonzales* (1954) 347 U.S. 637, at page 643, that:

> "In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning."

In the strict sense the word, "convicted" includes in its meaning the judgment or sentence rendered pursuant to a verdict, confession or plea of guilty. Vol. 24 C.J.S., p. 17, Sec. 1556 (a) (2); *Faunce* v. *The People of the State of Illinois*, 51 Ill. 311. *The petitioner in the case at bar received no sentence and none was entered in his case.* Therefore, in the strict sense of the word, the petitioner has not been "convicted" of a crime involving moral turpitude.

IV. The United States Court of Appeals in its opinion cited only the case of *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), which we submit is not in point and does not in any way dispose of the question of law involved in the case at bar. In *Hintopoulos* v. *Shaughnessy* (*supra*) it was admitted that the alien was *statutorily eligible* for consideration upon his application for suspension of deportation, but the Attorney General, in the exercise of his discretion based upon the facts which were presented and considered, denied suspension of deportation. The courts in such a situation will not overrule the

Attorney General unless he had acted capriciously or had no basis on the facts presented and considered to support his decision.

In the case at bar the respondent did not consider the facts presented in support of the petitioner's application for suspension of deportation. Instead, the respondent ruled that the petitioner as a matter of law was not eligible for consideration on his petition for suspension. In *Hintopoulos* v. *Shaughnessy* (*supra*) the alien was found *eligible* for consideration on his petition for suspension of deportation, but such petition was denied upon the facts that were presented. We contend that the United States Court of Appeals for the Seventh Circuit did not properly dispose of the legal question involved, in the case at bar and we are asking this Honorable Court to consider and properly dispose of the question of law raised herein.

V. The respondent made an erroneous legal conclusion when he held the petitioner as a matter of law was ineligible for suspension of deportation; and the courts do have jurisdiction and power to determine the correctness of such ruling. 3 C.J.S. Sec. 110, p. 799-800.

When the respondent, in the exercise of his administrative authority, decides an issue on the basis of an erroneous interpretation of the law, such a decision is comparable to one without a fair hearing. *Gegiow* v. *Uhl* (1915), 239 U.S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; *U.S. ex rel. Friedman* v. *Tod* (1924) 296 F. 888.

In the case of *Gegiow* v. *Uhl* (*supra*), 36 Sup. Ct. 2, at page 9 it was stated:

> "As was said in *Gonzales* v. *Williams*, 192 U.S. 1, 15,
>
> 'As Gonzales did not come within the Act of 1891, the Commissioner had no jurisdiction to

detain and deport her by deciding the mere question of law to the contrary.'

"Such a case stands no better than a decision without a fair hearing, which has been held to be bad." (cases cited)

We therefore submit that the petitioner was not given a fair hearing by the respondent because of the erroneous ruling of the question of law involved in the case at bar. The United States Court of Appeals for the Seventh Circuit failed to decide this question of law. We pray therefore that the question of law, of whether the petitioner was considered "convicted" of a crime involving moral turpitude which would support an order of deportation, should be fully presented to this Honorable Court for its interpretation.

VI. We further contend that the crime of burning personal property of another, in the State of Illinois, is not such a crime involving moral turpitude as was intended under Section 212 (a) (9) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(9). It seems to be universally accepted that the crime of arson is a crime involving moral turpitude. However, we should not confuse the crime of burning personal property of another, in the State of Illinois, as being arson. The Supreme Court of the State of Illinois has definitely held that the crime of burning personal property of another is neither arson at common law nor declared so by statute. *Creed v. People*, 81 Ill. 565.

The courts in this country have struggled with the interpretation, and its application to particular cases, of the meaning of the words "crimes involving moral turpitude", and in the final analysis, on borderline cases the Courts have arrived at their decision on this point from the particular facts and circumstances of each case, be-

ing always mindful of the fact that deportation is tantamount to banishment or exile. *Fong Haw Tan* v. *Phelan* (*supra*). The gravity of the punishment of deportation may at times far overshadow the crime committed, and therefore care should be exercised so that logic shall not take the place of understanding, as stated by the Court in *United States* v. *Day*, 51 F. (2d) 1010, at page 1021:

> "Yet if the government is right, the alien must be deported. We cannot ascribe to Congress a purpose to stake so grave a consequence on verbal tricks, or to put vital interests in peril on a prosecutor's whim." • • •
>
> " . . . But this alien has grown to manhood here. To root up all those associations which we call home, to banish him to be an outcast in a country of whose traditions and habits he knows nothing, and where his alienage is a daily, living fact, not a legal imputation—these are consequences whose warrant we may properly scrutinize with some jealousy, and insist that logic shall not take the place of understanding."

Congress also intended that aliens be not deported solely on the basis of inconsequential, unwitting infractions of the law. In the House Report No. 2096, 82nd Congress, the statement of Managers, at page 127 reported:

> "(1) The provisions of both bills which provide for deportation of aliens who are convicted in the United States of certain criminal offenses have been unfortunately subjected to a misconstruction, distorting the true purposes of these provisions. In compromising the differences between the Senate and the House versions, conferees have refined the language so as to make it emphatically clear that the Attorney General may not (as has been erroneously charged) capriciously deport an alien solely on the basis of inconsequential, unwitting infractions of the law".

Therefore, we contend that even though the petitioner were to be considered "convicted", the crime involved was not a "crime involving moral turpitude", and the case at bar should be reversed and remanded as requested herein.

CONCLUSION.

For the foregoing reasons it is respectfully submitted this this petition for a Writ of Certiorari should be granted.

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c/o Thomas Masuda
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Chicago 2, Illinois.

Of Counsel:
THOMAS MASUDA.

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 12233. SEPTEMBER TERM, 1957, APRIL SESSION, 1958.

TADASHI MIYAKI,
Plaintiff-Appellant,
v.
ROBERT H. ROBINSON, District Director, Chicago District, Immigration and Naturalization Service,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 8, 1958.

Before FINNEGAN, SCHNACKENBERG and HASTINGS, Circuit Judges.

FINNEGAN, *Circuit Judge.* Found ineligible for suspension of deportation, § 101 (b)(3), Immigration and Nationality Act of 1952, on the grounds he lacked good moral character, Miyaki, plaintiff-appellant, filed a complaint for declaratory judgment under § 10, Administrative Procedure Act, 5 U. S. C. § 1009. He appeals from the summary judgment entered against him on motion of the respondent District Director. Administrative remedies have been exhausted and no procedural questions are presented.

Miyaka, a Canadian citizen, was convicted in the Criminal Court of Cook County, Illinois, of burning a motor vehicle—an offense under Ill. Rev. Stat. 1953, c. 38, par.

50, § 15. He was placed on probation for 24 months and now claims he "is entitled to suspension of his deportation as a matter of law on that the finding of guilty in burning personal property is not such a conviction as to affect . . . (his) moral character, so that he would be eligible for further consideration on his application for suspension."

This case is controlled by *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 77 (1957): "Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met."

JUDGMENT AFFIRMED.

APPENDIX B.

ORDER DENYING PETITION FOR REHEARING OF UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Thursday, September 4, 1958

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge

TADASHI MIYAKI, *Plaintiff-Appellant,* v. ROBERT H. ROBINSON, District Director, etc., *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12233

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

APPENDIX C.

CHAPTER 38, ILL. REV. STAT. SEC. 50.

50. Of other property.] § 15. Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of any barrack, cocks, cribs, rick or stack of hay, corn, wheat, oats, barley or other grain or vegetable product of any kind; or any field of standing hay or grain of any kind; or any pile of coal, wood or other fuel; or any pile of planks, boards, posts, rails or other lumber; or any street car, railway car, boat, automobile or other motor vehicle; or any other personal property not herein specifically named; (such property being of the value of twenty-five dollars and the property of another person) shall upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than three years. [As amended by act approved June 26, 1929. L. 1929, p. 345.]

APPENDIX D.

SECTION 244 (a)(4) OF THE IMMIGRATION AND NATIONAL ACT OF 1952; 8 U.S.C. SECTION 1254(a)(4).

§ 1254. Suspension of deportation—Adjustment of status for permanent residence; contents.

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

• • •

(4) last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (1) of section 1251(a) of this title insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and

similar classes or under paragraph (2) of section 1251(a) of this title, as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

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OCTOBER TERM, 1958

TADASHI MIYAKI, PETITIONER

v.

ROBERT H. ROBINSON, DISTRICT DIRECTOR, CHICAGO DISTRICT, UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
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MALCOLM ANDERSON,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 413

TADASHI MIYAKI, PETITIONER

v.

ROBERT H. ROBINSON, DISTRICT DIRECTOR, CHICAGO DISTRICT, UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a–2a) is reported at 257 F.2d 806. The opinion of the District Court appears at pages 73–84 of the Appendix filed in the court below.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1958. A petition for rehearing was denied

[1] "App." refers to the Appendix used in the Court of Appeals, which is included in the record of this case now on file in the Clerk's office.

September 4, 1958 (Pet. 2a). The petition for a writ of certiorari was filed on October 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the crime of burning personal property of another, of which petitioner was found guilty, was one involving moral turpitude.

2. Whether petitioner, who was placed on probation for a fixed period, has been convicted of a crime within the meaning of the Immigration and Nationality Act of 1952.

STATEMENT

Petitioner, a Canadian citizen, is concededly deportable under Section 241 (a) (2) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1251 (a) (2)), *infra,* p. 9, having entered as a visitor in 1936 and overstayed (Pet. 5, App. 74). In May 1957, he applied for suspension of deportation under Section 244 (a) (1) of the same Act (8 U. S. C. 1254 (a) (1)), *infra,* pp. 9–10, which requires, as a condition of eligibility, proof of good moral character for the preceding seven years [2] (App. 50–55).

The special inquiry officer held that the petitioner was ineligible to be considered for such suspension

[2] Petitioner erroneously cites Section 1254 (a) (4) which applies to aliens who "last entered the United States within two years prior to, or at any time after June 27, 1952." Subsection 1 applies to aliens who "last entered the United States more than two years prior to June 27, 1952." Petitioner last entered the United States in 1936 (Pet. 5). However, the questions involved in this case are the same, regardless of which subsection is invoked.

because he had been convicted by an Illinois state court in 1954 of the crime of unlawfully and maliciously burning personal property of another in excess of $25 in value, a crime which the officer ruled to be one involving moral turpitude (App. 17–19). Under Section 101 (f) (3) of the 1952 Act (8 U. S. C. 1101 (f) (3)), *infra*, p. 8, by reference to Section 212 (a) (9) (8 U. S. C. 1182 (a) (9)), *infra*, pp. 8–9, no person convicted of a crime involving moral turpitude may be regarded as having established good moral character for the period in which it occurred. An appeal was taken to the Board of Immigration Appeals and the determination of the special inquiry officer was upheld (App. 11–13).

His administrative remedies exhausted, the petitioner sought judicial review in the United States District Court in Illinois, pursuant to the Administrative Procedure Act (App. 1–6). On motions for summary judgment, the trial judge ruled that the administrative determination was correct in all respects, and that petitioner was not entitled to any relief (App. 73–84). The suit was thereupon dismissed (App. 84). The petitioner appealed to the Court of Appeals for the Seventh Circuit, which affirmed the action of the trial judge (App. 85, Pet. 6, 1a–2a).

ARGUMENT

1. The Court of Appeals decided this case on the ground that the discretionary action of the Attorney General in denying suspension of deportation is not subject to judicial review, citing *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72. Since the Immigration

and Nationality Act states that persons not within the delineated classes need not necessarily be found to possess good moral character (Section 101 (f), 8 U. S. C. 1101 (f), *infra*, p. 8), it might be argued that it was within the discretion of the Immigration and Naturalization Service to find the petitioner not possessed of good moral character for the statutory period, even though he was not automatically barred by Section 101 (f) (3), 8 U. S. C. 1101 (f) (3), *infra*, p. 8. In the alternative, it might be said that the finding of statutory eligibility so blended with the exercise of the discretionary power as to preclude judicial review of the former to the same extent as the latter. However, the Service appears to have found petitioner statutorily ineligible as a matter of law, and not to have exercised any discretion in the matter. The District Court reviewed the administrative decision as presenting an issue of law. It is our position also that, even assuming full judicial review is available, the petitioner has shown no error in the administrative determination.

The petitioner has been found guilty, by a state court in Illinois, of the charge of burning the personal property of another. His contention that this crime does not involve moral turpitude because it would not have been a crime at common law is not persuasive. Many acts which are criminal by statute have been deemed crimes involving moral turpitude though the conduct proscribed did not constitute a common law offense. *E. g., Jordan* v. *DeGeorge*, 341 U. S. 223 (conspiracy to defraud the government of taxes on distilled spirits); *United States ex rel. Popoff* v. *Reimer*, 79 F. 2d 513 (C. A. 2) (fraudulently

aiding alien not entitled to naturalization to apply for citizenship); *United States ex rel. Medich* v. *Burmaster,* 24 F. 2d 57 (C. A. 8) (concealing assets belonging to trustee in bankruptcy). The problem with which the courts have concerned themselves in this area is whether the offense *necessarily* involves moral turpitude. The answer is that the definition of the crime must by its terms involve moral turpitude, *i. e.,* there must be an element of *mens rea* which goes beyond mere knowledge or even intent to commit the acts essential to prove the charge, so that it would not be possible to convict anyone of the crime without a valid inference of moral turpitude. The fact that the circumstances of the *particular* crime may show moral turpitude is not enough.[3] The Illinois statute here in question (Smith-Hurd Ann. St. Ch. 38, § 50) includes the words "willfully and maliciously" and the explanatory case of *Calef* v. *Thomas,* 81 Ill. 478, 481–482, indicates that the statutory offense involves moral turpitude.

2. The petitioner also contends that he was not "convicted" of a crime within the meaning of the Immigration and Nationality Act since he was placed on probation, rather than sentenced to confinement. He was, however, given a fixed sentence of 24 months probation on a finding of guilt which remains of record against him for all time thereafter. This has all the elements of a final conviction. The case of *Korematsu* v. *United States,* 319 U. S. 432, while

[3] See *Ablett* v. *Brownell,* 240 F. 2d 625 (C. A. D. C.); *United States ex rel. Zaffrano* v. *Corsi,* 63 F. 2d 757 (C. A. 2); *Forbes* v. *Brownell,* 149 F. Supp. 848 (D. D. C.)

viewing the problem for different purposes, is authority for the proposition that confinement is not necessary for a defendant to be treated as finally convicted. Illinois treats such a sentence as this as a conviction for the purposes of its Habitual Criminal Statute, *People* v. *Rave*, 364 Ill. 72, and for purposes of impeaching a witness, *People* v. *Andrae*, 295 Ill. 445.

It is also evident that Congress has not made confinement the test of determining a "conviction." Section 212 (a) (9), *infra*, pp. 8–9, makes an exception, from its blanket exclusion of all aliens "convicted" of a crime involving moral turpitude, of aliens who have committed only one such crime more than five years prior to admission "unless the crime resulted in confinement" in which case confinement must have ended more than five years before application. Congress thus showed a clear understanding that conviction would not be synonymous with confinement. Similarly, Section 241 (a) (4), *infra*, p. 9, dealing with deportation of persons convicted of crimes involving moral turpitude, makes a distinction between those convicted within five years for one crime, as to which the alien must be sentenced to confinement or confined, and those aliens "convicted" of two crimes "regardless of whether confined therefor." Congress in these statutes must have had in mind the fact that not all convictions result in confinement. It was specifically legislating with respect to the particular situation presented here—a final conviction which does not result in confinement.

This Court has recognized that the differing probationary schemes of the various states may result in

different consequences, depending on whether the states treat a judgment of probation as a final conviction. In *Pino* v. *Landon*, 349 U. S. 901, Massachusetts characterized its own probationary treatment in such fashion as to remove the odium of conviction from Pino's record. The Immigration and Naturalization Service attempted its own independent characterization but was ordered by this Court, in effect, to accept the characterization of the Commonwealth of Massachusetts. Here, as shown above, the Illinois judgment is treated as a final conviction. And if a uniform federal definition were to be applied, the judgment would, for the reasons already discussed, clearly be a final one under federal law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1958.

APPENDIX

The Immigration and Nationality Act of 1952, 8 U. S. C. 1101, *et seq.*, provides in pertinent part:

1. Section 101 (f) (3) (8 U. S. C. 1101 (f) (3)):

> For the purposes of this Act—
>
> No person shall be regarded as, or found to be a person of good moral character who, during the period for which good moral character is required to be established, is, or was—
>
> * * * * * * *
>
> (3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212 (a) of this Act; or paragraphs (9), (10), and (23) of section 212 (a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
>
> * * * * * *
>
> The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.
>
> * * * * * *

2. Section 212 (a) (9) (8 U. S. C. 1182 (a) (9)):

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * *
>
> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essen-

tial elements of such a crime; except that aliens who have committed only one such crime while under the age of eighteen years may be granted a visa and admitted if the crime was committed more than five years prior to the date of the application for a visa or other documentation, and more than five years prior to date of application for admission to the United States, unless the crime resulted in confinement in a prison or correctional institution, in which case such alien must have been released from such confinement more than five years prior to the date of the application for a visa or other documentation, and for admission, to the United States;

* * * * *

3. Section 241 (a) (2) and (4) (8 U. S. C. 1251 (a) (2) and (4)):

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

4. Section 244 (a) (1) (8 U. S. C. 1254 (a) (1)):

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19 (d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or

* * * * *

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